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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 13

DOYLE SMITH, *Petitioner*

v.

EVENING NEWS ASSOCIATION

On Writ of Certiorari to the Supreme Court of the State of Michigan

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted pursuant to the Court's order of March 26, 1962 (R. 37-38), inviting the Solicitor General to file a brief expressing the views of the United States.

QUESTION PRESENTED

Whether a suit for damages for breach of a collective bargaining contract between a labor organization and an employer in an industry affecting commerce may be maintained in a State court, when the conduct constituting the breach of contract is concededly also an unfair labor practice under the National Labor Relations Act.

STATEMENT

Petitioner is an employee of the respondent Evening News Association, and a member of the Newspaper Guild of Detroit. Respondent publishes a newspaper in Detroit, Michigan, and is engaged in interstate commerce. (R. 2-3, 9, 21.) At all times relevant herein, there was in effect a collective bargaining contract between respondent and the Guild which provided, *inter alia*, that: "There shall be no discrimination against any employee because of his membership or activity in the Guild" (R. 4).

Alleging a breach of this provision of the contract, petitioner, individually and as assignee of 49 other employees who were also Guild members, brought a common law damage action against respondent in the Circuit Court of Wayne County (R. 3, 4-5). The complaint asserted that during the period December 1, 1955, through January 16, 1956, a group of respondent's employees belonging to a union other than the Guild were on strike; that during the strike respondent permitted employees in the Editorial Department, Business Office and Advertising Department, who were not covered by any collective bargaining agreement, to report on the premises even though there was no work available, and paid them full wages; but that, although petitioner and his assignors were available for work on their regular shifts,[1] respondent allowed only a few of them to enter the premises, and as a result they lost considerable money in wages (R. 4-5). The complaint further asserted that respondent's refusal to pay full wages to the Guild employees, while paying full wages

[1] Petitioner and the employees he represents were employed as janitors, elevator operators and watchmen (R. 9).

to the non-union employees, was in violation of the no-discrimination clause of the Guild contract (R. 5). Damages were claimed in the amount of $20,000 (R. 5).

Respondent's answer denied the charge of discrimination and added that the court, in any event, lacked jurisdiction over the subject matter (R. 5-7). Amplifying the latter defense, respondent also moved to dismiss the complaint on the ground that the acts alleged, if true, would constitute an unfair labor practice under the National Labor Relations Act, and hence the subject matter was within the exclusive jurisdiction of the National Labor Relations Board (R. 11, 24). The trial court agreed that the subject matter was within the Board's exclusive jurisdiction, and dismissed the suit (R. 10-20).

On appeal, the Michigan Supreme Court affirmed (R. 23-36). Deeming the preemption principles enunciated in *Garmon* and related cases[2] to be controlling, and finding that it was "agreed for purpose of this case that the action alleged as constituting a breach of contract would also constitute an unfair labor practice,"[3] the court concluded that the matter was within the exclusive jurisdiction of the National Labor Relations Board and thus not cognizable in a State court (R. 35-36).

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[2] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser-Busch*, 348 U.S. 468.

[3] Section 8(a)(3) of the National Labor Relations Act (29 U.S.C. 158(a)(3)) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Petitioner did not file an unfair labor practice charge with the Board, and one would now be barred by the six-month limitations period imposed by Section 10(b) (R. 35).

SUMMARY OF ARGUMENT

It is the government's position that the considerations which underlie the doctrine of preemption enunciated in *Garmon* have no application to suits for enforcement of collective bargaining agreements, as this Court has recognized in *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, and *Local 174, Teamsters*, v. *Lucas Flour Co.*, 369 U.S. 95, and that to oust the State or federal courts of jurisdiction over such suits would not only fail to promote, but would actively obstruct, the purposes of the National Labor Relations Act. Thus the Michigan courts were not without competence to remedy the alleged breach of contract merely because the conduct alleged might also have constituted an unfair labor practice under the Act.

The enforcement of collective bargaining agreements differs in at least two critical respects from the enforcement of State statutes or tort law, the usual subjects of preemption. (1) When a State court adjudicates controversies under a labor contract in an industry affecting commerce, the law which it applies is federal law and the policy it implements is federal policy. Congress deliberately chose to entrust this aspect of the national regulatory scheme to the State and federal courts, rather than to the Board, and there is no reason to suppose that it intended the courts to relinquish their assigned jurisdiction to remedy contract violations merely because the violation in question might also happen to be an unfair labor practice. (2) Whereas the standards of conduct prescribed by State statute and tort law are created by government and imposed coercively on the parties from without, those prescribed in a collective bargaining agreement are devised by the parties themselves and shaped to the de-

mands of the particular enterprise. It is plain that the parties to a labor contract may, if they so wish, adopt for their own enterprise standards of conduct either more or less stringent than those the Act would require in the absence of contract, and that they may waive freedom which the Act would otherwise grant. Thus the danger of conflicting substantive rules, which is perhaps the touchstone of preemption, is largely banished when it is a *contract*, rather than a rival scheme of governmental regulation, which overlaps the Act. Moreover, where the parties are free to fashion their own substantive rules of conduct, there can be no objection to their selecting their own procedures and remedies. Indeed, it is the declared policy of Congress to allow full play to the methods of adjustment agreed upon by the parties.

Furthermore, the courts may often be in a better position than the Board to provide a full and meaningful solution to the complex of related issues which are frequently involved in a labor controversy. In many contract disputes, the unfair labor practice element, to which the Board's jurisdiction is confined, may be only a small segment of the total problem. In other cases, the unfair labor practice question, though perhaps dispositive of the whole controversy, may turn entirely upon subsidiary questions of contract interpretation which make no demands on the Board's expertise and which might better be decided by the courts, into whose hands Congress put them. Also, courts and arbitrators have a wider and more flexible repertoire of remedies at their disposal than does the Board. While the limitations on Board remedies were urged unsuccessfully upon this Court in the *Garmon* case, we submit that, in light of the important differences be-

tween contractually-created remedies and governmentally-created remedies, it would be destructive of federal policy to deprive parties of the relief contemplated by their collective bargaining agreements merely because the Board might be powerless to grant such relief.

Finally, a decision ousting the State court of jurisdiction in the present case would have a disruptive impact upon the functioning of private grievance arbitration, an institution in favor of which the Board itself has frequently stepped aside.

ARGUMENT

THE STATE COURT WAS NOT DEPRIVED OF JURISDICTION TO REMEDY THE ALLEGED BREACH OF CONTRACT MERELY BECAUSE THE CONDUCT CONSTITUTING THE BREACH COULD ALSO CONSTITUTE AN UNFAIR LABOR PRACTICE UNDER THE NATIONAL LABOR RELATIONS ACT

A. The Garmon Preemption Principles and the Considerations Which Underlie Them

Under *Garmon* and related cases it is settled that State courts may not, through the application of State statutes or tort law, regulate conduct which is protected by Section 7[4] or prohibited as an unfair labor practice by Section 8[5] of the National Labor Relations

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[4] See *Automobile Workers* v. *O'Brien*, 339 U.S. 454; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383.

[5] See *Plankinton Packing Co.* v. *Wisconsin Board*, 338 U.S. 953; *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser-Busch*, 348 U.S. 468; *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. There is one major exception, *i.e.*, violence. See *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656; *Automobile Workers* v. *Russell*, 356 U.S. 634.

Similarly, the State may not decide representation questions which are subject to the Board's jurisdiction under the Act. See *Bethlehem Steel Co.* v. *New York Board*, 330 U.S. 767; *La Crosse Telephone Corp.* v. *Wisconsin Board*, 336 U.S. 18.

Act.[6] To leave the States free to regulate such conduct "involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law" and "would create potential frustration of national purposes." *Garmon*, 359 U.S. at 244. Therefore, whenever an activity is "arguably subject" to either of the above provisions, "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, *supra*, at 245. This rule of preemption obtains whether the State is undertaking to apply labor relations policy or some more general policy, whether its scheme of regulation coincides with or conflicts with the Act, or whether the regulation takes the form of an injunction or merely damages. The rationale for vesting exclusive jurisdiction in the Board was articulated in *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-491:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid [those] diversities and conflicts

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[6] These principles were recently reaffirmed in *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173.

likely to result from a variety of local procedures and attitudes toward labor controversies * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

B. These Considerations Do Not Apply to Judicial Enforcement of Collective Bargaining Agreements

If the principles summarized above were applicable to the present case, they would, of course, support the conclusion of the Michigan courts that, since the conduct alleged was arguably an unfair labor practice, the State court was deprived of jurisdiction. This Court has indicated, however, in several recent decisions that the *Garmon* preemption principles are not applicable to suits involving judicial enforcement of collective bargaining agreements. Thus, in *Local 174, Teamsters, v. Lucas Flour Company*, 369 U.S. 95, the Court held that a State court had jurisdiction, applying federal law pursuant to Section 301 of the Labor Management Relations Act,[8a] to award damages for strike activity found to be in breach of contract, even though that activity, absent the State court's ultimate finding, was "arguably" protected by Section 7 of the National Labor Relations Act. The Court pointed out that (369 U.S. at 101, n. 9):

> Since this was a suit for violation of a collective bargaining contract within the purview of § 301(a)

[8a] Section 301(a) (29 U.S.C. 185) provides that: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

of the Labor Management Relations Act of 1947, the pre-emptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant. [Citing decisions by the courts of appeals to the same effect.] * * *. It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N.L.R.B. to remedy unfair labor practices, as such. See generally, Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52.[7]

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[7] Nor is a contrary conclusion suggested by *In re Green*, 369 U.S. 689. In that case, the State court, without a hearing, had held a union attorney in contempt for advising his client to continue picketing in violation of an *ex parte* restraining order which issued on application of the employer. The attorney believed that the restraining order was invalid because it enjoined activity which was within the Board's exclusive jurisdiction. It was the employer's position, on the other hand, that the State court was empowered to issue the order since the union activity was in breach of a no-strike clause of a collective bargaining agreement. This Court set aside the contempt citation, on the ground that a State court may not hold a person in contempt for violating an injunction which it "had no power to enter by reason of federal pre-emption," and that, without a hearing, it was impossible to determine "whether or not the dispute was exclusively within the jurisdiction of the National Labor Relations Board under the principles of [citing *Garmon* and *Bus Employees*, *supra*]" (369 U.S. at 692).

Contrary to the view expressed in the dissenting and concurring opinion (369 U.S. at 694), we do not interpret this holding as inconsistent with the views expressed in *Dowd Box* and *Lucas Flour*, *supra*, *viz.*, that the *Garmon* pre-emption principles are inapplicable to a suit to enforce a collective bargaining agreement. We believe that the Court's opinion merely reflects its view that, on the record in *Green*, it was not clear that there was in effect a collective bargaining agreement which would support the em-

See also, *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 245, n. 5.[8]

Similarly, in *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, the Court rejected the use of preemption principles to support the contention that Congress had restricted suits to enforce contracts under Section 301 of the Labor Management Relations Act to the federal district courts. After setting forth the passage from *Garner* quoted above, the Court stated (368 U.S. at 513):

> By contrast, Congress expressly rejected that policy with respect to violations of collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices. Instead, Congress deliberately chose to leave the enforcement of collective agreements "to the usual processes of the law."

The conclusion that Congress did not intend the doctrine of pre-emption to apply to suits to enforce collective bargaining agreements is supported by the following considerations:

1. The function which a State court performs when it enforces obligations under a collective bargaining

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ployer's suit. The union attorney offered to show, for example, that the alleged collective bargaining contract had been signed by unauthorized agents, and that, at the time of the picketing, a refusal to bargain charge was pending before the Board. 369 U.S. at 691.

[8] These views accord with the almost uniform holdings of the courts of appeals on this question. See *Steelworkers, Local 4261* v. *New Park Mining Co.*, 273 F. 2d 352, 355-358 (C.A. 10); *Lodge No. 12, IAM* v. *Cameron Iron Works*, 257 F. 2d 467 (C.A. 5); *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (C.A. 3); *Textile Workers* v. *Arista Mills*, 193 F. 2d 529, 533-534 (C.A. 4); *United Electrical Workers* v. *Worthington Corp.*, 236 F. 2d 364, 367 (C.A. 1). But cf. *United Electrical Workers* v. *General Electric Co.*, 231 F. 2d 259 (C.A. D.C.) certiorari denied, 352 U.S. 872; *Anson* v. *Hiram Walker & Sons*, 222 F. 2d 108 (C.A. 7), certiorari denied, 350 U.S. 840.

agreement in an industry affecting commerce is very different from the function it performs when it enforces a State statute or tort law. In the former case, the law which the court applies is not State, but federal law,[9] and the policy it implements is the declared policy of Congress to foster industrial peace by "encouraging the practice and procedure of collective bargaining." See 29 U.S.C. 141. It would not have been surprising had Congress entrusted the enforcement of labor contracts to the same specialized agency which administers other aspects of the national policy. Congress elected, however, not to follow that approach. In 1947, it considered and specifically rejected a proposal which would have made breach of a collective bargaining agreement an unfair labor practice, deciding instead that contract enforcement "should be left to the usual processes of the law and not to the

[9] *Local 174, Teamsters*, v. *Lucas Flour Company*, 369 U.S. 95; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241, 245-247; *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448. Respondent suggests that since this is a suit by individual employees, rather than by the union, it could not have been brought in a federal court under Section 301 of the Labor Management Relations Act, and is therefore controlled by state, not federal, law. (Br. in Opp. 5). We disagree. The contract sued on is one "between an employer and a labor organization representing employees in an industry affecting commerce" (Section 301, Labor Management Relations Act). Moreover, the provision sought to be enforced—which bans discrimination on account of union membership—affects the union as well as the individual employees and thus cannot be regarded as a uniquely personal right of the employees. Cf. *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437. In these circumstances, it would follow under the decisions cited above that the cause of action is within the purview of Section 301 and that federal law would govern all substantive issues. See Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1551-52, particularly fn. 69 (1962); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. Rev. 362, 370-375 (1962).

National Labor Relations Board.'"[10] To widen the availability of the judicial remedy, Congress added Section 301 of the Labor Management Relations Act, which opened the doors of the federal district courts to suits on collective bargaining agreements and authorized the development of a body of federal law, applicable both in State and federal courts, for the resolution of questions involving such agreements. See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448.

In light of the above history, the argument for preemption in the present context entails the conclusion that, even though Congress deliberately decided that the courts and not the Board should exercise jurisdiction over suits on collective bargaining agreements, such jurisdiction should nonetheless be deemed withheld whenever the alleged contract violation also happens to be an unfair labor practice. To read a qualification of this magnitude into what Congress sought to achieve through Section 301,[11] without any supporting evidence either in the Act itself or its legislative history, is plainly unwarranted. If anything, indeed, the legislative history of the Taft-Hartley Act tends to suggest that in cases of overlap the Board's remedy was *not* to be exclusive. Thus, the Conference

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[10] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42; Leg. Hist. of the LMRA, 1947 (G.P.O. 1948), 546. The legislative history of Section 301 is detailed in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 452, *Board Box Co.* v. *Courtney*, 368 U.S. 502, 510-511, and *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 205-209.

[11] We assume that, if the preemption doctrine were applicable to suits on collective bargaining agreements, *federal* as well as *State*, courts would be ousted of jurisdiction. Indeed, the Court so indicated in *Garmon*, where it said that "the States as well as the federal courts" must defer to the Board's exclusive competence, 359 U.S. at 245.

Committee on the Labor Management Relations Act dropped from Section 10(a) of the National Labor Relations Act a provision making the Board's power to prevent unfair labor practices exclusive, but retained language providing that this power should be unaffected by other means of adjustment or prevention. The purpose of this action, as the conference report explains, was to make clear "that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies."[12]

2. Mechanical application of the preemption doctrine in the present context overlooks fundamental differences between the collective bargaining agreement, on the one hand, and State statutes and tort law on the other, as sources of enforceable rights and obligations. The latter are rules devised by government and imposed coercively upon the parties from without. By contrast, the standards of conduct prescribed by the collective bargaining agreement are self-imposed and are shaped to the particular needs and circumstances of the enterprise whose industrial life they govern.[13]

[12] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 52, Leg. Hist. of the LMRA, 1947 (G.P.O. 1948), 556.

[13] Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 Col. L. Rev. 52, 53 (1957). See also, Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: II*, 59 Col. L. Rev. 269, 282-301 (1959); Note, *Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice*, 69 Harv. L. Rev. 725 (1956).

To be sure, as this Court pointed out in *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 580, entering into a labor agreement is not as voluntary as is the entry into other contracts, for the law compels the parties to deal with each other, in good faith. However, a choice still exists as to what form the contract is to

Because these obligations are voluntarily assumed, their enforcement by tribunals other than the Board does not entail the same danger of upsetting the federal statutory balance between the interests of labor and management that is present when another governmental body attempts to impose restraints which were not bargained for.[14] The parties to a collective agreement can, if they so wish, adopt for their own enterprise standards of conduct either more or less stringent than those contemplated by the National Labor Relations Act. With some exceptions they can waive rights and privileges granted them by the Act or, in some instances, authorize activities which the Act would otherwise condemn. Thus, whereas the requirements of federal supremacy may make it impossible to invoke a State statute against a peaceful strike, breach of the no-strike clause in a collective bargaining agreement

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take; "it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces" (*Id.*, at 580).

[14] "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." *Local 1976, Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 99-100. This is especially true with respect to peaceful picketing and strike activity. As the Court observed in *Garner* v. *Teamsters Union*, 346 U.S. 485, 499-500: "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing."

may render a union liable for damages even though in the absence of contract the strike would be privileged. Comment, *Statutory and Contractual Restrictions on the Right to Strike During the Term of a Collective Bargaining Agreement*, 70 Yale L. J. 1366, 1395 (1961). Similarly, the parties may empower the employer to take specified action with respect to wages, hours, or other terms of employment without notifying or consulting the union, though such unilateral action would otherwise be enjoinable as a refusal to bargain. See *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395. *National Labor Relations Board* v. *Katz*, 369 U.S. 736. In short, the possibility of conflicting substantive rules which arises when rival schemes of coercive regulation occupy the same field, and which necessitates the displacement of one scheme by the other, is largely absent when it is a *contract* which overlaps the Act. The very notion of collective bargaining looking towards enforceable contracts assumes the parties will arrange enforceable obligations in addition to those prescribed by federal law.

Thus, while the effectuation of federal policy requires that the legal obligations it imposes be exclusive of other involuntary obligations lest a State proscribe conduct that the federal law intends to be free, the federal policy contemplates the contractual assumption of additional obligations to be enforced in forums other than the NLRB. And, since there is no suggestion that the administrative remedy for an unfair labor practice would be impaired, the provision of contractual remedies for some acts which may also be unfair labor practices cannot interfere with the operation or policy of the Act.

In the present case, it is the possibility of disparate procedures and duplicating remedies,[15] rather than of conflicting substantive rules, which is invoked as an argument for preemption. But the fundamental objection to allowing another forum, such as a State court, to enforce the unfair labor practice provisions of the National Labor Relations Act is that the other forum may adopt an interpretation or grant a remedy different from the federal law. Where the parties are free to fashion their own substantive rules of conduct, there can be no objection to their selecting the procedures and remedies by which those rules are to be interpreted and enforced. Indeed, the goal of collective bargaining is to obtain an agreement which will not only set the terms and conditions of employment for the enterprise, but will also set up machinery for the amicable settlement of disputes arising thereunder. To this end, most labor contracts provide that controversies as to interpretation or application are to be resolved through a grievance procedure culminating in final arbitration.[16] Where the parties have bargained for lawful contractual provisions and agreed upon a procedure for enforcing them, it would promote industrial peace and the private resolution of disputes to give effect to their arrangements, while requiring the parties

[15] The measure of relief in both instances would be substantially the same. Thus, had the Board sustained petitioner's charges, it could have ordered respondent to compensate petitioner and his assignor for the wages lost as a result of the discrimination. The damages sought in the State court suit were for an equivalent amount (R. 35).

[16] As this Court observed in *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578, "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."

to utilize only their remedy before the Board would impair these objectives. Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), proclaims that "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *" That policy, as this Court has observed, "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566.

To be sure, the contract involved in the present case does not appear to contain an arbitration clause, or, at any rate, not one which would have covered petitioner's grievance. This fact, however, does not impair the above analysis. In choosing not to submit their disputes to arbitration, the parties agreed, in effect, to utilize the established machinery of the courts for resolution of their disputes and to rely upon the normal judicial remedies. To confine petitioners, instead, to their remedies before the Board would defeat their contractual expectations, deprive them of whatever bargained-for benefits the no-discrimination clause was intended to confer, and thus impair the flexibility and autonomy of the bargaining process to almost the same extent as would the preemption of an arbitration provision.[17]

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[17] At this point we should note a potentially significant distinction, the validity of which need not be determined in the present case. Under some circumstances, it might be argued that a collective bargaining agreement merely adopted as such a wide range of obligations imposed by the National Labor Relations Act (*e.g.*,

3. There are cogent practical reasons why the courts should not be forced to relinquish jurisdiction over conduct which is arguably governed by the Act, as well as by contract. In the first place, the aggrieved party may be unable to obtain a hearing on the merits before the Board, either because the General Counsel refuses to bring a complaint or because the Board itself declines to assert jurisdiction. Even though, in some cases, an action for breach of contract could subsequently be brought in a State or federal court,[18] the fruitless resort to the Board would result in added expense, inconvenience, and delay, and might well preclude any meaningful preventive relief.

Second, the unfair labor practice element of many contract questions is only a small part of the total problem, and it is impractical to segment the problem and have part of it adjudicated by the Board and the re-

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the full statutory duty to bargain collectively as interpreted and applied by the NLRB), but provided judicial remedies. See discussion in *Textile Workers* v. *Arista Mills Co.*, 193 F. 2d 529, at 533 (C.A. 4). In such a case, it could perhaps be urged with some force that the parties were attempting to frustrate the congressional policy of providing an exclusively administrative remedy for the statutory obligations. In the overwhelming proportion of collective bargaining agreements, however, including the present case, the parties are prescribing their own substantive code of conduct for the treatment of employees. In some instances the rules they adopt may coincide with obligations imposed by federal law, but they are obviously intended to have their own substantive significance. To deny the tribunals which the parties implicitly or explicitly provided for the enforcement of these contractual obligations, wherever part of them coincides with the statutory obligations, would create the arbitrary and unworkable procedure discussed later in the text.

[18] 29 U.S.C. (Supp. III) 164(e)(2).

mainder by the court or arbitrator.[19] For example, the no-discrimination clause in the present contract is frequently coupled with a provision protecting employees against discharge without "just cause." If the question of wrongful discharge were submitted to a court, it would be empowered, upon finding that there was no discrimination on account of union activity, to go on and determine whether the discharge was in any event a violation of the "just cause" provision. The Board, on the other hand, would exhaust its jurisdiction upon finding no discrimination under Section 8(a)(3).[20]

Frequently, moreover, the unfair labor practice question, though perhaps dispositive of the entire controversy, may turn exclusively upon difficult subsidiary questions of contract construction, *e.g.*, whether unilateral action by the employer is or is not authorized by the collective agreement.[21] Such questions make no demands upon the Board's expertness and might as well, or even better, be adjudicated by arbitrators and the courts, to whose hands Congress confided them.

Finally, there are substantial advantages from the standpoint of remedy in resorting to a court or arbitrator, rather than to the Board. In many cases, though not the present one, the Board would be powerless to grant compensatory relief. And even in a discharge case, where the Board is authorized to grant reinstatement and full back pay, it lacks the flexibility with which an arbitrator, and probably also a judge sitting in equity, could devise an award or penalty

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[19] Cf. *Machinists* v. *Gonzales*, 356 U.S. 617.

[20] See Meltzer, *op. cit.*, pp. 288-289; *Dunau*, *op. cit.*, pp. 68-72.

[21] See Dunau, *op. cit.* pp. 72-80.

which is commensurate with the degree of employee blame.[22]

We recognize the Board's limited remedial power was a consideration urged upon this Court without success in the *Garmon* case. There, the Court held that even "the State's salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme," and that "to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board" accentuates the danger of conflict with federal policy. 359 U.S. at 247. However, in light of the important distinctions, discussed at pp. 13-17, *supra*, between contractual rights and remedies, on the one hand, and governmentally-created rights and remedies, on the other, we submit that it would defeat, rather than promote, federal policy to deprive parties of the relief contemplated by their collective bargaining agreements merely because the Board might be powerless to grant such relief.

4. Although no arbitration agreement seems to be involved in the present case, a decision here which ousted the State court of jurisdiction would almost inevitably have a crippling impact upon the operation of private grievance procedures. The effectiveness of these procedures often depends, in the final analysis, upon the availability of judicial sanctions. It is the courts which must compel recalcitrant parties to submit to arbitration and to abide by the arbitrator's decision. Yet, where the subject matter of the labor dispute falls within the purview of Sections 7 or 8 of the Act, a

[22] See Dunau, *op. cit.*, pp. 70-71, 81.

court would intrude upon the Board's exclusive competence by policing the arbitration process just as much as it would by enforcing the underlying substantive obligations themselves. Indeed, the question of preemption has often arisen in the State and lower federal courts in connection with suits to compel or enjoin arbitration, or to enforce an arbitration award.[23] To the extent that the *Garmon* doctrine were applied to prevent the courts from acting in such situations, compliance with arbitration agreements would become merely optional.

Moreover, although we recognize the possibility of a distinction, the considerations which underlie the preemption doctrine, if applicable to suits on collective bargaining agreements, would seem to require arbitrators, as well as courts, to defer to the Board, a result which would seriously undermine the Congressional policy of giving full play to the methods of grievance settlement that the parties themselves have chosen.[24] The strength of that policy has long been recognized by the Board in its administration of the National Labor Relations Act.[25] Though Section 10(a)

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[23] See, *e.g.*, *Steelworkers, Local 4264* v. *New Park Mining Co.*, 273 F. 2d 352 (C.A. 10) (suit to compel arbitration); *Lodge No. 12 IAM* v. *Cameron Iron Works*, 257 F. 2d 467 (C.A. 5) (suit to compel arbitration); *United Electrical Workers* v. *Worthington Corp.*, 236 F. 2d 364 (C.A. 1) (suit for specific enforcement of arbitration award); *Post Publishing Co.* v. *Cort*, 334 Mass. 199, 134 N.E. 2d 431 (suit to enjoin arbitration); *McAmis* v. *Panhandle Eastern Pipe Line Co.*, 273 S.W. 2d 789 (Mo. App. 1954) (action to enforce arbitration award).

[24] See p. 17, *supra*.

[25] It should also be noted that, although the Senate Labor Committee had proposed handling breach of a collective bargaining agreement through Board processes as an unfair labor practice (a proposal which was rejected in Conference, *supra*, pp. 11-12), it

of the Act provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise," the Board, from its earliest days, has declined to exercise jurisdiction with respect to unfair labor questions which had been, or could have been, submitted to arbitration under the collective bargaining contract between the parties.[26] Thus, in *Consolidated Aircraft Corp.*, 47 NLRB 694, it was alleged that the employer had made unilateral changes in wages in violation of Section 8(a)(5) and had discharged two employees in violation of Section 8(a)(3). Finding that the propriety of the wage changes turned on an interpretation of the collective agreement, which could have been, but was not, submitted to arbitration under the contract, and that the question of the discharges could likewise

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added this caveat (S. Rep. No. 105, 80th Cong., 1st Sess., p. 23, Leg. Hist. of the LMRA, 1947 (G.P.O. 1948), 429):

> The committee wishes to make it clear that • • • it is not intended that the National Labor Relations Board shall undertake to adjudicate all disputes alleging breach of labor agreements. Any such course would be inimical to the development by the parties themselves of adequate grievance-handling and voluntary arbitration machinery. • • • Hence the committee anticipates that the Board will develop by rules and regulations a policy of entertaining under these provisions only such cases alleging violation of contract as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration, or if necessary by litigation in court. • • • .

[26] An exception is usually made only where all of the parties have not agreed to be bound by the arbitration procedure, the arbitration proceedings were not fair, or the result reached was repugnant to the purposes and policies of the Act. See *Monsanto Chemical Co.*, 97 NLRB 517; *Wertheimer Stores Corp.*, 107 NLRB 1434.

have been processed under that procedure, the Board dismissed the unfair labor practice charges. With respect to the unilateral change issue, the Board stated (47 NLRB at 706):

> * * * the existence of a collective contract between the parties involved does not preclude the Board from finding that unfair labor practices have taken place and issuing an appropriate order. We are of the opinion, however, that it will not effectuate the statutory policy of "encouraging the practice and procedure of collective bargaining" for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contract to the Board. We therefore do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen. * * *

And, in *Spielberg Manufacturing Company*, 112 NLRB 1080, where it was alleged that the employer had discriminated in violation of Section 8(a)(3) by refusing to reinstate four strikers, the Board dismissed the charges on the ground that the question had been submitted to arbitration under the contract and the arbitrator had determined that the employees had disqualified themselves for reinstatement by strike misconduct. The Board stated (112 NLRB at 1082):

> * * * the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award. * * * *[27]

In summary, to hold that the courts and arbitrators have jurisdiction over conduct which constitutes both a contract violation and an unfair labor practice comports with Congress' decision to leave breach of contract questions to the "usual processes of the law"; it effectuates the congressional policy of encouraging collective bargaining and the private resolution of disputes; and it enables contract questions to be decided by tribunals which are often in better position than the Board to provide a full and meaningful solution. This conclusion, of course, entails the risk of conflicting court and Board determinations, which the *Garmon* principles would avoid. But, it "is implicit in the choice Congress made that 'diversities and conflicts' may occur." *Dowd Box Co.* v. *Courtney*, 368 U.S. at 514. In any event, the risk, at most, is limited to the possibility of conflicting findings of fact.[28] For, as we have noted, the contract action here is within the purview of Section 301 of the Labor Management Relations Act, and hence the State court would be obliged to decide it in accordance with principles of federal

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[27] See also *Crown Zellerbach Corp.*, 95 NLRB 753; *United Telephone Company of the West*, 112 NLRB 779; *Hercules Motor Corp.*, 136 NLRB No. 145.

[28] Cf. *United Brick & Clay Workers* v. *Deena Artware*, 198 F. 2d 637, 642 (C.A. 6), certiorari denied, 344 U.S. 897.

law, in the ascertainment of which it will, of course, look to decisions of the Board. Moreover, a decision by a court or an arbitrator denying relief on the contract claim does not oust the Board of jurisdiction to remedy an unfair labor practice.[29] Should it find that such decision was contrary to Board principles, it would be free to redetermine the issue and provide its own remedy (see p. 9, *supra*).[30]

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[29] Admittedly, charges must be filed with the Board within six months of the alleged unfair labor practice, Section 10(b); 29 U.S.C. 160(b). However, where the practice complained of is a continuing course of conduct, or where complaints are filed concurrently before the court and the Board, the Board may still be able to act even after the court has rendered its decision.

[30] There may be some situations, however, where the action of the court or arbitrator would preclude the Board from making effective its own decision. Suppose, for example, that, during the life of a contract with union A, most of the employees defect to union B, and a question arises as to which union is entitled to administer the contract and to recognition from the employer. If a court in a contract action were to rule in favor of B and the Board in an unfair labor practice proceeding were to rule in favor of A, an intolerable conflict would result. In this event, it would seem that the court decision would have to give away. See Section 10(a) of the National Labor Relations Act; *Doll & Toy Workers* v. *Metal Polishers*, 180 F. Supp. 280 (S.D. Cal.); Meltzer, *op. cit.*, pp. 292-301; cf. *Hill* v. *Florida*, 325 U.S. 538. In an effort to minimize conflicts of this nature, this Court held, in *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, 29, that jurisdiction under Section 301 did not require "a preliminary determination of the representative status of the labor organization involved." Such conflicts might further be minimized if the courts were to abstain, at least pending Board determination, from deciding contract questions as to which the judgment and expertise of the Board would be helpful, *e.g.*, whether a contract clause violated Section 8(e) of the National Labor Relations Act or whether certain work is covered by a Board certification. See Meltzer, *op. cit*; *Local No. 1505, Electrical Workers*, v. *Local 1836, Machinists* (C.A. 1), decided June 4, 1962, 50 LRRM 2337, rehearing denied, 50 LRRM 2777; cf. *Local 35, Hod Carriers* v. *Mason Tenders District Council*, 291 F. 2d 496 (C.A. 2). See also, *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 496-500.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be reversed.

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